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# IN THE SUPREME COURT OF THE UNITED STATES

Feb 29 2000

Stenberg, et al.,

*Petitioners,*

v.

Carhart, et al.,

*Respondents.*

On Writ of Certiorari to The United States Court of Appeals for the Eighth Circuit

Motion to File a Brief *Amicus Curiae* and Brief *Amicus Curiae* of **Texas Black Americans for Life** and **L.E.A.R.N. (the Life Education And Resource Network)** in support of Petitioner Stenberg

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38 pp

## MOTION TO FILE A BRIEF AMICUS CURIAE

**Texas Black Americans for Life** and **L.E.A.R.N. (the Life Education And Resource Network)** request leave of this Court to file a brief ***amicus curiae*** in support of Petitioner Stenberg in ***Stenberg v. Carhart***, #99-830. These organizations were founded by African-Americans who are concerned about the racial genocide aspects of abortion. The members thereof also feel a need to speak out about the link between slavery and abortion. The brief focuses on relevant matter not otherwise brought to the attention of this Court.

We are aware that this Court declined the invitation to reconsider the nonpersonhood holding of ***Roe v. Wade*** in this case, but this brief deals with a unique and slightly different perspective of that issue as it is presented by the facts of this case---constitutional protection even in the absence of Fourteenth Amendment personhood. For example, no one, it would seem, has picked up on the fact that between the time of the outlawing of slavery by the Thirteenth Amendment and the time of the ratification of the Fourteenth Amendment, it was possible for one to have constitutional protection which the courts were bound to respect, even though (in the absence of the Fourteenth Amendment) we African-Americans, for instance, were still subject to the "nonpersonhood" holding of this Court in ***Dred Scott*** (***Scott v. Sandford***, 60 U.S. (19 How.) 393, 15 L.Ed. 691 (1857)).

Quite understandably, this point apparently has not been discussed in the cases or by the commentators. Our unique perspective as victims of slavery, however, gives us insight into this issue not commonly obtainable elsewhere. This

brief is, to the best of our knowledge, the sole source of a discussion of this issue, which we tailor to the facts of this case concerning partial-birth abortions. In order to give the Court a complete understanding of this point, we first examine this issue from its historical perspective, and then add points and details which may illuminate the topic.

This Court, we know has been flooded before with numerous briefs detailing the biological basis for establishing the humanity of the unborn, and in this case those points will no doubt be well briefed again. This Court likewise has been advised before of the wonders of modern medicine which allow surgeries to be performed in the womb. All that being said, we leave the discussion of those points in detail to those other briefs.

We were advised in telephone conversations that our requests to counsel for the petitioner and for the respondent were timely made. However, Respondent Carhart, we have been told, has agreed to consent to only ten briefs ***amicus curiae***, and the priorities of the office of Petitioner Stenberg were to give consent for those ten briefs to other, more prestigious organizations. Neither party has given express consent. We therefore respectfully request that this Court grant us leave to file this brief.

Counsel of record on this brief is experienced at practice in this Court as counsel of record in the filing of petitions for a writ of certiorari (and in being co-counsel for same), and as counsel of record on certain ***amici*** briefs filed with this Court. These have all been in cases pertaining to abortion. The text of this brief, 27 pages, is set in the same point size (12 point) as this motion.

99-830

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## INTEREST OF THE AMICI

Texas Black Americans for Life and L.E.A.R.N. (the Life Education And Resource Network) are organizations founded by African-Americans who are concerned about the racial genocide aspects of abortion. The members thereof also feel a need to speak out about the link between slavery and abortion.[1] This brief is filed by motion, not by consent.

## SUMMARY OF ARGUMENTS

I. In the constitutional scheme of things, this Court recognized even in ***Dred Scott*** that those who are not persons within the meaning of the United States Constitution could have rights under state law which the federal courts would be bound to respect. The right of the State of Nebraska to offer this protection to the unborn is subsumed within this sovereign right. For surely the enactment of the **Fourteenth Amendment** did not diminish the scope of protections which one might have under the law even in ***Dred Scott***. Pp. 2-13.

Furthermore, freed African-American slaves had constitutional protection via the **Thirteenth Amendment** even before the enactment of the **Fourteenth Amendment**, which overturned the holding of this Court in ***Dred Scott*** which said that we were not persons. Pp. 13-14.

The scope of these protections extends to the unborn every bit as much as it did to us. Consequently, a portion of ***Roe***

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1 Counsel of record is the sole author of this brief. No monetary contribution was made toward its preparation and filing by any person other than members of the ***amici*** organizations or by counsel of record.



***v. Wade*** must be reviewed for the proper adjudication of this case even though the question of **Fourteenth Amendment** personhood need not be. Pp. 14-15.

Such a review of ***Roe*** is imperative now because the honor of this Court is at stake. Pp. 15-22.

The reconsideration of a portion of ***Roe*** does not jeopardize the constitutional basis of liberty interests discussed therein. Pp. 22-23. Nor does the **First Amendment** disallow a recognition that the states have the sovereign right to recognize the natural personhood of the unborn. Pp. 23-25.

II. On the facts, the idea that placing an unborn child into a breech-birth position can be healthy for the mother, when a live delivery is possible without such a maneuver, is implausible. Pg. 25.

III. Judge Samuel Sewall of the Salem witchcraft trials set an example for us by his courage, honesty, and character. Pp. 26-27.

## ARGUMENTS

### I. Constitutional Protection Of One's Interests May Exist Even Without Fourteenth Amendment Personhood.

This Court has been flooded before with numerous briefs detailing the biological basis for establishing the humanity of the unborn, and no doubt in this case it shall be so again. This Court likewise has been advised before of the wonders of modern medicine which allow surgeries to be performed in the womb. All that being said, we shall leave

the discussion of those points in detail to those other briefs.

A. Even In ***Dred Scott*** This Court Recognized The Rights Of Personhood Which May Be Had Under State Law.

On one prior occasion, in ***Planned Parenthood v. Casey***,[2] these same ***amici*** brought to this Court's attention certain statements of this Court from its ***Dred Scott*** decision in which this Court affirmed the sovereign right of the states to clothe those who are subject to its jurisdiction with protection which even this Court is bound to recognize and honor. Whereas before we simply made reference to the passages wherein those quotes can be found, we now wish to state the quotes in full:

> "In discussing this question, we must not confound the rights of citizenship which a state may confer within its own limits, and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all the rights and privileges of the citizen of a State, and yet not be entitled to the rights and privileges of a citizen in any other State. ***For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of a citizen, and to endow him with all its rights.*** But this character, of course, was confined to the boundaries of the State,

2 ***Planned Parenthood v. Casey***, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992).



> and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. ***Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or any one it thinks proper, or upon any class or description of persons;*** yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish an uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with rights and privileges secured to a citizen of a State under the federal government, although, ***so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen, and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.***"[3]

Later in that same case, this Court went on to say,

> "The Government of the United States had no right to interfere for any other purpose but that of protecting the rights of the owner, leaving it

3 ***Scott v. Sandford***, 60 U.S. (19 How.) 393, 405-406, 15 L.Ed. 691, 700-701 (1857) (emphasis supplied).

> altogether with the several States to deal with this race, whether emancipated or not, as each State may think justice, humanity, and the interests and safety of society require. ***The States evidently intended to reserve this power exclusively to themselves.***"[4]

To say that the states can not now protect the rights of the unborn is to say that *Dred Scott* went too far in allowing the recognition of personhood; it is also to say that *Dred Scott* did not go far enough in prohibiting the recognition of personhood. And to say (as this Court did in *Roe v. Wade*),[5] that all this is somehow accomplished by the **Fourteenth Amendment**,[6] which was intended to overrule *Dred Scott* to the extent that this Court *did* refuse to recognize personhood, is to turn the **Fourteenth Amendment** inside out and stand it on its head, to put it mildly.

Granted, under the **Fourteenth Amendment**, the question of what to do with any class of persons is no longer reserved exclusively to the states. But it cannot be the case that the **Fourteenth Amendment** actually took away from the states "the undoubted right to confer on whomsoever it pleased the character of a citizen, and to endow him with all its

4 60 U.S. (19 How.) at 426, 15 L.Ed. at 709 (emphasis supplied).

5 *Roe v. Wade*, 410 U.S. 113, 152-153, 93 S.Ct. 705, 726-727, 35 L.Ed.2d 147, 176-177 (1973).

6 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.



rights" which this Court, as we say, took note of in *Dred Scott*.[7] Rather, the **Fourteenth Amendment** added to the Constitution enabling power for the federal government to increase and expand the protections of the law and establish a recognized, uniform minimum of what personhood is. It most certainly did not give the federal government power to breach the state/federal barrier and take away personhood which might otherwise already exist under state law.

The power to grant the protection which the State of Nebraska grants to the unborn in the instant case is subsumed within the sovereign power of the states recognized in *Dred Scott*. For the granting of the protection given by this statute is an exercise of those very sovereign powers conceded therein by this Court, albeit to a slightly lesser extent than the full measure of sovereign power which this Court knew it must honor in *Dred Scott*.

Contrary to what some would have us believe, this concept does not enable the states to trample on the rights secured by the U.S. Constitution. Prof. Dworkin, for instance, has expressed the fear that an unencumbered right of the states to endow personhood on anything could lead to a diminution of First Amendment rights, since making trees persons would perhaps mean they could not be cut down, thereby putting an end to all publishing.[8]

This Court, however, has never had any trouble before distinguishing between the constitutional rights of natural

7 60 U.S. (19 How.) at 405, 15 L.Ed. at 701.

8 **Unenumerated Rights: Whether and How *Roe* Should Be Overruled**, 59 U.Chi.L.Rev. 381, 400-401 (1992). ***See also, Casey, supra***, 505 U.S at 912-913, 112 S.Ct. at 2839, 120 L.Ed.2d at 738-739 (Stevens, J., concurring in part and dissenting in part).

persons and those of artificial persons (e.g. a supposed Fifth Amendment right of a corporation against self-incrimination).[9] For as this Court made clear, natural persons have retained rights, whereas artificial persons have no retained rights; artificial persons have only those rights created by positive law.[10] Consequently, the personhood of trees would have to yield to the retained First Amendment rights of a natural person. Also, trees have no human life which can either be protected or taken away from them, whereas unborn children do.

Let us consider for a moment the position of Prof. Dworkin in some detail. He said,

> "The suggestion that states are free to declare a fetus a person... assumes that a state can curtail some persons' constitutional rights by adding new persons to the constitutional population. The constitutional rights of one citizen are of course very much affected by who or what else also has constitutional rights, because the rights of others may compete or conflict with his. So any power to increase the constitutional population by unilateral decision would be, in effect, a power to decrease rights the national Constitution grants to others.
>
> "...If a state could declare trees to be persons with a constitutional right to life, it could prohibit publishing newspapers or books in spite of the First Amendment's guarantee of free speech, which could not be understood as a license to kill... Once we

9 ***Hale v. Henkel***, 201 U.S. 43, 74-75, 26 S.Ct. 370, 378-379, 50 L.Ed. 652, 665-666 (1906).
10. Ibid.



> understand that the suggestion we are considering has that implication, we must reject it. If a fetus is not part of the constitutional population, under the national constitutional arrangement, then states have no power to overrule that national arrangement by themselves declaring that fetuses have rights competitive with the constitutional rights of pregnant women."[11]

Now let us look further at this Court's statements in ***Dred Scott***.

> "It is very clear, therefore, that no State can, by any Act or law of its own, passed, since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it."[12]
>
> *****
>
> "It is true, every person, and every class and description of persons, who were at the time of the adoption of the Constitution recognized as citizens in the several States, became also citizens of this new political body; but none other; it was formed by them, and for them and

11 ***See***, **Unenumerated Rights**, ***supra***, at 400-401.
12 60 U.S. (19 How.) at 406, 15 L.Ed. at 701.

their posterity, but for no one else. And the personal rights and privileges guarantied [sic] to citizens of this new sovereignty were intended to embrace those only who were then members of the several state communities, or who should afterwards, by birthright or otherwise, become members, according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of persons and rights of property; it made him a citizen of the United States."[13]

*****

"This case [cited therein], however, strikingly illustrates the consequences that would follow the construction of the Constitution which would give the power contended for, to a State. It would, in effect, give it also to an individual. For if the father of young Darnall had manumitted him in his lifetime, and sent him to reside in a State which recognized him as a citizen, he might have visited and sojourned in Maryland when he pleased, and as long as he pleased, as a citizen of the United States; and the state officers and tribunals would be compelled, by

13 60 U.S. (19 How.) at 406-407, 15 L.Ed. at 701.



the paramount authority of the Constitution, to receive him and treat him as one of its citizens, exempt from the laws and police of the state in relation to a person of that description, and allow him to enjoy all the rights and privileges of citizenship, without respect to the laws of Maryland, although such laws were deemed by it absolutely essential to its own safety."[14]

Were these words in ***Dred Scott*** and the law review article perhaps written by the same person, one might wonder? Does the Court not see the parallels between the reasoning of Prof. Dworkin today and its own statements in ***Dred Scott***? And are the similarities not striking?

The one important difference between what this Court said in ***Dred Scott*** and what Professor Dworkin is saying is that in ***Dred Scott***, this Court was willing to allow one to have personhood for purposes of state law within the given state which had granted such personhood. Professor Dworkin, however, takes a position even more hostile than ***Dred Scott*** to the recognition of rights which one might have.

Note well, please, that in ***Dred Scott*** this Court reasoned that no offense against the constitutional population is committed within the boundaries of the state which would recognize one's personhood; this would only be the case if the Constitution were to then require other states to recognize such personhood.

By Prof. Dworkin's analysis, however, the constitution now enables this Court to move into the jurisdiction of state law and abolish personhood and other such protections

14 60 U.S. (19 How.) at 425, 15 L.Ed. at 709.

offered thereby. Such a position also takes the view, by implication, that ***Dred Scott*** did not go far enough in refusing to recognize rights, and that ***Dred Scott*** went too far to the extent that it ***would*** allow one's rights to be recognized and vindicated by the states. And similarly, through his acceptance of ***Roe***, Prof. Dworkin sees all of this as somehow being accomplished by the **Fourteenth Amendment**. How phenomenal.

Now, as to the question of whether the sovereign right of the states to recognize natural personhood includes a recognition of such rights in the unborn, let the Court consider one Southern case from 1820, ***State v. Jones***, in which a criminal defendant claimed he could not be charged with the murder of a slave on the grounds that a slave is not a person. The court held, however, that killing a slave was every bit as much a murder as killing an unborn child.[15] The reasoning of that case, we note, impeaches both the reasoning and the recitation of the history of the rights of African-Americans in ***Dred Scott***.

For the Mississippi court even expressly noted therein that the Constitution of the United States refers to slaves as persons.[16] The U.S. Constitution, after all, never did refer to African-Americans as three-fifths of a person. It has always called us persons, but said that only three-fifths of us would be counted for purposes of a census.[17] And this

15 ***State v. Jones***, 2 Miss. 39, 40, Walker 83, 85 (June Term, 1820).
16 2 Miss. at 39, Walker at 84.
17 Representatives and direct taxes shall be apportioned among the several states which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other ***persons***. **U.S. Const. art. 1, §. 2, cl. 3** (emphasis supplied).



Southern court equated the unborn with us African-American persons.

This is precisely the type of sovereign right of the states to recognize personhood which this Court was referring to in ***Dred Scott***. This is how the rights of African-Americans were vindicated in the State of Mississippi at the time, even though African-Americans were not recognized as being persons within the meaning of the U.S. Constitution. This Court must recognize that the states still similarly possess this character to protect the unborn to this day, just as the court in Mississippi said in 1820.

We would also remind this Court that, prior to the development of the Incorporation Doctrine, it was simply hornbook law that the Bill of Rights protected the rights of the citizens of the states against encroachment by a foreign jurisdiction---the federal jurisdiction. This is still supposed to be the case today, of course. But in ***Roe***, this Court justified its decision in part on the **First, Fourth, Fifth,** and **Ninth Amendments,**[18] thereby actually using the Bill of Rights to render the unborn (who otherwise would be protected under state law) helpless against an encroachment of federal power on their rights which this Court even in ***Dred Scott*** would not have dared to trespass against. Again, this turns the **Fourteenth Amendment**, the basis for the Incorporation Doctrine, on its head.

Were we not warned about such things, however? As Justice Brandeis said in ***Olmstead v. U.S.***,

> "Experience should teach us to be most on our guard to protect liberty when the government's

18 410 U.S. at 152, 93 S.Ct. at 726, 35 L.Ed.2d at 176.

> purposes are beneficent... The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning, but without understanding."[19]

B. Constitutional Protection Also Exists Under The Thirteenth Amendment Even In The Absence Of Personhood Within The Meaning Of The Fourteenth Amendment.

The idea that one could have constitutional protection even in the absence of federal personhood may also be seen in the relationship between the **Thirteenth and Fourteenth Amendments**. The **Thirteenth Amendment**[20] was declared ratified in December of 1865. But it was only under the **Fourteenth Amendment** that this Court's holding in ***Dred Scott***[21] that African-Americans are not persons was overturned. That would not come until 1868. For over two years, African-Americans had constitutional protection under the **Thirteenth Amendment** without even being persons.

Now, how were these rights to be vindicated? The answer stems from the idea that in our constitutional scheme of things, no one level or branch of our governments is entrusted with all the rights which we hold.

As nearly as we can tell, prior to the ratification of the **Fourteenth Amendment,** if any of our people were still being held in slavery, they would have to appeal to the

19 ***Olmstead v. United States***, 277 U.S. 438, 479, 48 S.Ct. 564, 572-573, 72 L.Ed. 944, 957 (1928) (Brandeis, J., dissenting).
20 Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. **U.S. Const. amend. XIII, § 1.**
21 60 U.S. (19 How.) at 404-406, 15 L.Ed. at 700-701.



federal authorities to step in---either by the use of the sword, or by judicial process---and intervene in our behalf. On the other side of the coin, however, we note that even without our personhood, there were certain things which could not be done to us (i.e. hold us in slavery, or in involuntary servitude) by any private individual or government entity. For despite our lack of personhood, it was still the case that, immediately following the ratification of the **Thirteenth Amendment,** no court---federal or state---could have the authority to issue any order which would violate that constitutional protection against slavery which we then did have.

We bring this matter to the Court's attention in further support of the point that there does not even have to be federal personhood for there to be a constitutional shield against government action, even by a federal court. But this idea does have further relevance as well. For under ***Roe***, there simply is no definition of property right which the mother's right over the unborn child does not fit.[22] We would remind the Court that "slave"[23] and "slavery"[24] are defined, ***inter alia***, as the ownership of a human being as chattel property.

C. A Portion of ***Roe v. Wade*** Must Be Reviewed For The Proper Adjudication Of This Case Even Though The Question Of Fourteenth Amendment Personhood Need Not Be.

It being the case that there may be state law personhood which the federal courts are bound to respect, the Court

22 Ralph E. Boyer, et al., The Law of Property §§ 1.1-1.3 (4th ed. 1991). Roger A. Cunningham, et al., The Law of Property §§ 1.1-1.2 (2nd ed. 1993).
23 Webster's New Universal Unabridged Dictionary 1705 (Deluxe 2nd ed. 1979).
24 Black's Law Dictionary 1393 (7th ed. 1999).

need not revisit its holding in *Roe* that the unborn are not persons within the meaning of the **Fourteenth Amendment** for the proper adjudication of this case. For where there is adequate state law protection of one's rights as a natural person, that point is simply moot.

The Court may---and indeed should---await the proper case for revisiting its holding in *Roe* that the unborn are not persons within the meaning of the **Fourteenth Amendment**, one in which the facts are well-developed at trial, and the case is properly briefed. The Court, however, must recognize as error its holding in *Roe* that the federal courts are empowered to breach the separation of state and federal powers and thereby vitiate the protections of state law personhood or other rights subsumed therein.[25]

If this were an ordinary case, ***stare decisis*** would perhaps suffice. But on the facts, this is precisely the type of case which this Court has already recognized as being one in which ***stare decisis*** is insufficient. As this Court said in ***Edelman v. Jordan***:

> "In the words of Mr. Justice Brandeis: '***stare decisis*** is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right... This is commonly true even where the error is a matter of serious concern, provided correction can be had by legislation. But in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of

25 410 U.S. at 162, 93 S.Ct. at 731, 35 L.Ed.2d at 182.



> experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function.'" (citation omitted).[26]

This case established the law of ***stare decisis*** eighteen years before *Casey, supra,* was decided. Yet the Joint Opinion in *Casey* makes no mention of this point, while claiming that the Court's precedents governing the overruling of precedent did not apply in that case. ***See, Casey,*** 505 U.S. at 853-869, 112 S.Ct. at 2808-2816, 112 L.Ed.2d at 699-709.

Query, then, how this Court may have missed this point?

The quote of Justice Brandeis in ***Edelman*** comes from his famous dissent in ***Burnet v. Coronado Oil and Gas Co.***[27] We must pay close attention to the lesson which Justice Brandeis taught therein: If this Court is unwilling to reexamine its holdings of constitutional law in an appropriate case, it must very nearly invite the legislatures of the several states to legislate squarely contrary to the holdings of this Court in order to gain review of such holdings. Such interbranch disharmony is hardly in keeping with what the framers of the Constitution had in mind.

In making these statements which were quoted by this Court in ***Edelman***, Justice Brandeis dropped a footnote (footnote three, omitted from the Court's opinion in ***Edelman***) in which he cited three opinions in particular in

26 ***Edelman v. Jordan***, 415 U.S. 651, 671, n. 14, 94 S.Ct. 1347, 1359-1360, n. 14, 39 L.Ed.2d 662, 677, n. 14 (1974).
27 ***Burnet v. Coronado Oil and Gas Co.***, 285 U.S. 393, 406-408, 52 S.Ct. 443, 447-448, 76 L.Ed. 815, 823-825 (1932) (Brandeis, J., dissenting).

support of his position.[28] The first of these comes from Chief Justice Taney, nine years before ***Dred Scott:***

> "After such opinions, judicially delivered, I had supposed that question to be settled, so far as any question upon the construction of the Constitution ought to be regarded as closed by the decision of this court. I do not, however, object to the revision of it, and am quite willing that it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." ***The Passenger Cases***, 48 U.S. (7 How.) 283, 470, 12 L.Ed. 702, 781 (January Term, 1848) (Taney, C.J., dissenting).

Two other opinions (one dissent, and one for this Court itself) were also cited therein by Justice Brandeis:[29]

> "With as full respect for the authority of former decisions, as belongs, from teaching and habit, to judges trained in the common-law system of jurisprudence, we think that there may be questions touching the powers of legislative bodies, which can never be finally closed by the decisions of a court..." ***Washington University v. Rouse***, 75 U.S. (8 Wall.) 439, 444, 19 L.Ed. 498, 500 (1869) (Miller, J., dissenting).

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28 Ibid.
29 Ibid.



> "It is more important that the court should be right upon later and more elaborate consideration of the cases than consistent with previous declarations. Those doctrines only will eventually stand which bear the strictest examination, and the test of experience." ***Barden v. Northern Pacific R. Co.***, 154 U.S. 288, 322, 14 S.Ct. 1036, 1036, 38 L.Ed. 992, 1000 (1894).

Reasoned judgment[30] cannot withstand the force of such logic. On the contrary, reasoned judgment stands shoulder to shoulder with such logic to provide us with a better picture of the law.

Justice Brandeis then went on to say in his opinion,

> "The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying... the Constitution... This is strikingly true of cases under the due process clause..."[31]

***Roe*** itself, of course, was decided under the Due Process Clause of the **Fourteenth Amendment**.[32]

This Court can try to adjudicate this case without reexamining certain central portions of *Roe* if it wants to. But that would be like examining the forest without looking at the trees.

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30 ***See, Planned Parenthood v. Casey***, 505 U.S. 833, 849, 112 S.Ct. 2791, 2806, 120 L.Ed.2d 674, 697 (1992) (Joint Opinion).
31 285 U.S. at 410, 52 S.Ct. at 449, 76 L.Ed. at 826.
32 410 U.S. at 152-153, 93 S.Ct. at 726-727, 35 L.Ed.2d at 176-177.

We therefore ask the Court to bear in mind that the laboratory of the states[33] did not close down with the enactment of the **Fourteenth Amendment**. It is still open for business.

Let the Court now consider where we have come since *Roe*. When that case was decided, if anyone had told this Court at that time that so ghastly a procedure as is at issue here would follow in its wake, and that circuits of the Courts of Appeals would deem such practices to be shielded by *Roe*, the person sounding the alarm would either have been dismissed as a fanatic or scorned into silence.

Yet here we are. What, then? Have we lost our way, and become unsure of what we are here for? Law is to be the guardian of rights, not the extinguisher thereof.

Have we all perhaps become so numb that we can no longer feel the pain?

Things can only go from bad to worse. For given the miracles of modern medicine, can we be very far away---very far away at all---from the day when organs will be transplanted from one child in the womb to another, younger child who has already been born?

One child will be a person, invested with all the rights pertaining thereto. The donor child, however, will be... what? A zero? A nothing within the law?

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33 *See, New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-311, 52 S.Ct. 371, 386-387, 76 L.Ed. 747, 771 (1932) (Brandeis, J. dissenting). *See also, Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 292, 110 S.Ct. 2841, 2859, 111 L.Ed.2d 224, 251 (1990) (O'Connor, J., concurring).



Is this Court solidly of the opinion that this would not constitute slavery? And lest this Court think that the safeguards of the law at the moment are adequate to prevent such things, what will be the case if consent to harvest fetal organs for research or transplant use is the consideration necessary for an indigent woman to obtain an abortion which she would not be able to afford otherwise? This Court has made it clear repeatedly that undue economic barriers to obtaining an abortion violate *Roe*.[34] If state law personhood for the unborn cannot be recognized, and the right to kill one's own offspring in the womb is a constitutional right, how could prohibiting the donating of fetal organs in exchange for an abortion not be an undue economic burden in at least some cases?

In the final act of The Crucible, the playwright tells how, upon the morning of the final executions authorized by the Salem witchcraft trials, the judges thereof learn of circumstances which evince that something is terribly wrong, and receive notice thereby that the whole affair to date may have been a very egregious mistake.

They expressly reject the suggestion that they should postpone the final hangings pending a thorough investigation of the calamity, however, on the dubious (but academically tenable) grounds that it would be unjust to let some go free when others have already hanged.[35] But more insidious still is the unspoken current beneath the surface---that postponing the hangings will be a public admission that the whole affair was a mistake, that they, the learned judges, had been deceived, and that the whole

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34 *See, Akron v. Akron Center For Reproductive Health*, 462 U.S. 416, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983). *See also, Planned Parenthood, Kansas City of Missouri v. Ashcroft*, 462 U.S. 476, 103 S.Ct. 2517, 76 L.Ed.2d 773 (1983).

35 Arthur Miller, The Crucible 129 (1953).

affair, including the suspension of a nearly 500 year old right to a trial by jury, was a miscarriage of justice.

The judges, having the esteem of the community as being the very guardians of a system of law which was supposed to protect against such things, could not then face the public shame and humiliation which an admission of such doubts about the trials would entail. They let the final victims hang.

Must this Court in turn be faced with a similar dilemma? May it never be so. God save this honorable Court.

This Court, in fact, has already dodged such a bullet once. Consider ***Sierra Club v. Morton,***[36] a case originally brought up to this Court along with ***Roe*** to consider questions of federal jurisdiction. In that case, three justices of this Court---Blackmun, Brennan, and Douglas---would have granted standing to trees, rocks, and rivers (and perhaps snakes, even?), though they would have denied it to the unborn.[37] ***Roe***, however, was put over for reargument.

Had ***Roe*** not been put over for reargument the next term, the two cases might actually have been decided on the same day---to the great embarrassment of this Court, we must regretfully say, particularly to the author of this Court's opinion in ***Roe***. And even today, we note, apparently none, or very few, will toll the bell for those who are

36 ***Sierra Club v. Morton,*** 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972).
37 ***Sierra Club v. Morton,*** 405 U.S. at 755, 92 S.Ct. at 1376, 31 L.Ed.2d at 654 (1972) (Blackmun, J., dissenting); 405 U.S. at 755, 92 S.Ct. at 1376, 31 L.Ed.2d at 654 (Brennan, J., dissenting); and 405 U.S. at 741, 92 S.Ct. at 1369, 31 L.Ed.2d at 647 (Douglas, J., dissenting).



victims of a partial-birth abortion.[38]

The case that launched a thousand briefs will not soon go away. The honor of this Court is at stake. A reconsideration of those parts of ***Roe*** which gave rise to the ugly phenomenon of partial-birth abortion is not optional.

Liberty indeed finds no refuge in a jurisprudence of doubt.[39] But neither does it find a refuge in a jurisprudence of hoping that somehow or in some way the inevitable will not eventually reach the very steps of this Court.

It is therefore incumbent upon this Court to save itself from embarrassment now, and greater embarrassment to come, by recognizing that federal courts in particular have no place in declaring that the primary repository of our rights---the states---have no business legislating against such a ghastly procedure.

## 1.) ***Roe*** Is Not Necessary For The Protection Of Anything Except Abortion.

***Roe*** has been cited as being necessary for the protection of certain constitutional rights.[40] Such statements, however, are not only incorrect as a matter or law, but ironically even constitute admissions adverse to the continued

38 ***See, Sierra Club v. Morton,*** 405 U.S. at 760, n. 2, 92 S.Ct. at 1378, n. 2, 31 L.Ed.2d at 657, n. 2 (1972) (Blackmun, J., dissenting).
39 ***See, Casey, supra,*** 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (opening statement of the Joint Opinion).
40 ***Casey, supra,*** 505 U.S. at 857-859, 112 S.Ct. at 2810-2811, 120 L.Ed.2d at 702-703 (Joint Opinion). ***See also, Thornburgh v. American College of Obstetricians and Gynecologists,*** 476 U.S. at 778, n. 6, 106 S.Ct. at 2188, n. 6, 90 L.Ed.2d at 805, n. 6 (1986) (Stevens, J., concurring).

acceptance of *Roe*.

To say that *Roe* is necessary for the protection of a constitutional right is to say that *Roe* did not follow the law. For if *Roe* is truly necessary to reach a particular result, then it must be the case that the same force of reasoning which forms the basis of *Roe* cannot be found elsewhere in the U.S. Constitution or in the cases.

That being the case, *Roe* would have to be a creation of organic law---an organic expansion of the Constitution, at that, a power which this Court has declared it does not have even with respect to simple statutory construction or even common-law adjudication.[41]

On the other hand, if *Roe* did follow the law, then all that it purports to do to protect the liberty interests of the Constitution can also be found in those other cases which this Court has said *Roe* did follow, thereby rendering *Roe* unnecessary.[42] And happily, as it turns out, the actual liberty interests referred to in *Roe* are not even dependent upon reference to *Roe* for their recognition.[43]

2.) The First Amendment Does Not Disallow A State Recognition Of Personhood.

Perhaps the most inexplicable myth of *Roe* is that

41 *See, Willy v. Coastal Corporation*, 503 U.S. 131, 135, 112 S.Ct. 1076, 1079, 117 L.Ed.2d 280, 287 (1992). *See also, Northwest Airlines v. Transport Workers Union of America*, 451 U.S. 77, 94-95, 101 S.Ct. 1571, 1582-1583, 67 L.Ed.2d 750, 764-766 (1981).

42 *See, Casey, supra*, 505 U.S. at 852-853, 112 S.Ct. at 2807-2808, 120 L.Ed.2d at 699 (Joint Opinion).

43 *See, Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. at 287-292, 110 S.Ct. at 2856-2859, 111 L.Ed.2d at 247-251 (1990) (O'Connor, J., concurring).



somehow the **Establishment Clause of the First Amendment**[44] requires us to refuse to recognize the personhood of the unborn. If anything, however, precisely the opposite is the case.

The only way the personhood of the unborn can be unknown or unknowable is if theological or philosophical criteria are introduced into the analysis of the issue. If they are excluded---if only objective, secular (i.e. biological) criteria are employed---there can be but one answer: an unborn child is a person.

The Court in *Roe* found it significant that those trained in the respective disciplines of medicine, philosophy, and theology disagreed on this subject.[45] But in attributing significance to the views of the disciplines of philosophy and theology, this Court denied the personhood which the unborn would otherwise unquestionably be entitled to within guidelines which employ secular criteria alone. Did this Court not thereby violate its own **First Amendment** jurisprudence?[46] Certainly at a minimum, the **First Amendment** does not disallow a recognition of state law personhood.

Let us look back at this Court's history for a moment. In 1857, when *Dred Scott* was decided, the discipline of genetics did not yet exist. There was no unimpeachable biological method of ascertaining the humanity of African-

44 Congress shall make no law respecting an establishment of religion. U.S. Const. amend. I, § 1, cl. 1.

45 410 U.S. at 159, 93 S.Ct. at 730, 35 L.Ed.2d at 181.

46 *See, Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992). *See also, Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) (proscribing advancing a religious point of view or developing an unnecessary entanglement with religion).

Americans. And the Quakers were steadfastly trying to gain a recognition of our humanity.

Does this mean that our humanity was just a religious issue back then? Will this Court continue to rely on a line of reasoning in which it implicitly takes the position that this Court, in 1857, could not have recognized our own personhood as being a violation of the **First Amendment**?

As to those who argue that we must follow the **First Amendment** in adjudicating the personhood status of the unborn, we say that we agree. And even if they do then draw the conclusion that the unborn are not persons, we still hope that they keep on making those **First Amendment** arguments. Because those arguments support our conclusion, not theirs.

## II. A Partial Breech Birth Is Not A Healthy Thing.

One thing above all others on the facts stands out in our minds. When a mother near term hears that her baby is properly positioned, head-first, for its birth, is she joyous, or full of worry instead? And if she hears that her child is in a position for a breech birth, does this lighten her heart, or bring her fear?

How it could be the case that deliberately setting the child into a breech-birth position would ever be of help to the mother is something which remains a mystery to us. How it could ever possibly be necessary to actually save the life of the mother, when a Caesarean section birth or a normal vaginal delivery is an option, is truly puzzling.



## III. Judge Samuel Sewall Of The Salem Witchcraft Trials Set An Example For Us.

In 1697, a humbled, contrite man handed a note to his pastor at a service in South Church in Boston, Massachusetts. Judge Samuel Sewall, one of the jurists of the Salem witchcraft trials five years earlier, then stood and listened while his pastor, Samuel Willard, read aloud his Bill of Contrition, which read:

> "Samuel Sewall, sensible of the reiterated strokes of God upon himself and family; and being sensible, that as to the Guilt contracted, upon the opening of the late Commission of Oyer and Terminer ["to hear and decide"] at Salem... Desires to take the Blame and Shame of it, Asking pardon of Men, And especially desiring prayers that God, who has an Unlimited Authority, would pardon that Sin and all other his Sins; personal and Relative: And according to his infinite Benignity, and Soveraignty, Not Visit the Sin of him, or of any other, upon himself or any of his, nor upon the Land: But that He would powerfully defend him against all Temptations to Sin, for the future, and vouchsafe him the Efficacious, Saving conduct of his Word and Spirit."

Judge Sewall then bowed and retook his seat.[47]

He didn't have to do that. He had only been doing his duty in 1692 as he saw it, and in any event he was immune from prosecution. But Judge Sewall's most recent diary

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47 T.B. Strandness, Samuel Sewall: A Puritan Portrait 75-76 (1967). 1 M. Halsey Thomas, The Diary of Samuel Sewall 367 (1973). Ola Elizabeth Winslow, Samuel Sewall of Boston 134-135 (1964).

entries prior to his noting of his Bill of Contrition make mention of the fact that he had recently buried his abortive (i.e. miscarried) son, and that he and his wife grieved the losses of their "little daughter and other children" which they had suffered over time.[48]

Judge Sewall felt that he had to do this in order to make all things right, as these afflictions were, in his view, "the reiterated strokes of God upon himself and family"[49] in punishment for his role at the Salem trials.

Arising from the ashes of sin and despair which his participation in that tribunal wrought upon him, however, he then went on to become an early outspoken opponent of slavery, publishing a book denouncing that institution three years later, and warning therein that any nation which would suffer the evils of such an institution to flourish unchecked in the land must surely suffer God's wrath in some great calamity to come.[50]

## CONCLUSION

The judgment of the United States Court of Appeals for the Eighth Circuit must be reversed.

Respectfully submitted,

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48 1 M. Halsey Thomas, The Diary of Samuel Sewall 366 (1973).
49 1 M. Halsey Thomas, The Diary of Samuel Sewall 367 (1973).
50 Samuel Sewall, The Selling of Joseph, A Memorial (1700). This was reprinted by The University of Massachusetts Press in 1969.